

The Second Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood Railway Carmen/Division of TCU
(Burlington Northern Railroad Company

STATEMENT OF CLAIM:

1. That the Burlington Northern Railway Company violated the terms of our current Agreement, particularly Rule 35(a), when they arbitrarily disciplined Carman Stephen E. Taylor without holding an investigation as per Rule 5(a) of our current Agreement.

2. That the Burlington Northern Railway Company violated the terms of the current Agreement, Rule 39, when they arbitrarily required Claimant to submit to a physical reexamination, random (sic) drug screening test without just or reasonable cause.

3. That accordingly, the Burlington Northern Railroad Company be ordered to compensate in the amount of fifty-eight (58) hours at the time and one-half (1.5) rate commencing December 2, 1985 through January 9, 1986. Further, that Claimant be compensated in the amount of twenty-two and one-half (22.5) cents per mile for 660.4 miles.

FINDINGS:

The Second Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant is a welder at the Carrier's Springfield, Missouri Car Shop with over 17 years of service. As part of a periodic physical examination conducted by the Carrier, Claimant was given a drug test which showed positive for the presence of marijuana. After referral to an employee assistance counselor and further evaluation, Claimant was referred to the Heartlight

Treatment Program at the Carrier's expense. Claimant attended the rehabilitation program as an outpatient without loss of work or pay from December 2, 1985, until successful completion on January 10, 1986. The instant claim seeks compensation for the time spent in the program (58 hours and 45 minutes at the time and one-half rate) along with compensation for mileage (22.5¢ for 660.4 miles) and expenses for individual testing.

The Organization argues that requiring Claimant to attend the rehabilitation program was disciplinary and the failure to hold a hearing under Rule 35(a) was in error; no authority existed for requiring employees to submit to physical examinations since Rule 39(b) applies only to applicants for employment and not current employees; the requirement that Claimant submit to a drug test was without probable cause; the drug test used by the Carrier was unreliable and problems existed with the chain of custody of the urine specimen.

Under the facts of this case, we do not view the Carrier's action of requiring Claimant to participate in the Heartlight Program as discipline entitling Claimant to a hearing under Rule 35(a). The program was structured so that Claimant participated on an outpatient basis and, as a result, Claimant lost no work or pay. In short, no discipline was imposed. We view the Carrier's action of requiring Claimant to participate in the rehabilitation program as a question concerning whether Claimant was physically qualified to continue working and under what conditions Claimant would be deemed physically qualified to work. Medical determinations concerning physical qualifications have traditionally been held as non-disciplinary but, nevertheless, subject to an arbitrary and capricious standard of review. See e.g., Second Division Awards 7863, 7087, Third Division Awards 21991, 14249. Here, after Claimant failed a drug test, the Carrier determined that Claimant could continue working provided that he successfully participated in the Heartlight Program. Under the circumstances, and further given that Claimant lost no work or pay, we cannot say that such action was either arbitrary or capricious.

Nor can we find error in the fact that Claimant was required to submit to a periodic physical examination. While the Organization is correct that Rule 39(b) applies only to applicants for employment and does not specifically address the question of imposition of periodic physical examinations for current employees, it is well-established that in light of the nature of the industry with its attendant safety requirements for the public and employees, carriers may require periodic physical examinations of their employees in order to aid in the assessment of whether employees are fit to perform their duties. First Division Awards 15591, 13859.

The question of the propriety of requiring an employee to submit to a drug test as part of a periodic physical examination is an issue that very recently was held by the Supreme Court to be one that must be decided by this Board as a minor dispute. See Consolidated Rail Corporation v. Railway Labor Executives' Association, 489 U.S. _____, (1989). Therefore, our decision in this matter is limited to the Carrier's ability to test Claimant as a former Frisco employee and does not encompass the overall question concerning whether this Carrier can administer drug tests to all employees as part of a periodic physical examination.

With respect to the reliability of the drug test, although the Organization asserts that the "Carrier has chosen to use the EMIT test rather than other means of testing" and the EMIT alone is not a reliable detection device, the record demonstrates that Claimant's specimen was subject to an EMIT screen along with a confirmatory GC/MS exam. No evidence in the record raised on the property rebuts or challenges that assertion. Therefore, the Carrier's assertion that Claimant's specimen was subjected to a confirmatory GC/MS test must be accepted as fact. Giving the Organization the benefit of the doubt and assuming that this aspect of the case requires application of standards that ordinarily attach to disciplinary matters, the evidence and arguments going to this issue, at best, are to be viewed under a substantial evidence standard. Even using that standard, we cannot say that the Organization has rebutted the Carrier's demonstration that the tests were reliable. While differing opinions exist as to the validity and reliability of the tests used, the record in this case demonstrates that the results of the tests were confirmed by the GC/MS exam which, even under a substantial evidence standard, sufficiently demonstrates reliability of the results. See PLB No. 4106, Award No. 1, PLB 3715, Award No. 14, PLB 3408, Award No. 44. Further, while not dispositive, we also note that the results of the test are not inconsistent with separate assessments made on Claimant wherein Claimant divulged a "chemical abuse history ... as being in the middle or crucial phase of chemical dependency."

Finally, with respect to the question of chain of custody, the record does not sufficiently establish that problems with the chain of custody existed to require a contrary result.

Having found no impropriety with the imposition of the physical examination or drug test for Claimant as a former Frisco employee or in the test administration or results, we find no basis to award Claimant with the compensation sought. We must therefore deny the Claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 26th day of July 1989.